United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1465 FINAL

To be argued by
ROBERT ULLMAN

In The

United States Court of Appeals

For The Second Circuit

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AMERICAN IMAGE CORPORATION,

Plaintiff-Appellant,

vs.

UNITED STATES POSTAL SERVICE and JOHN R. STRACHAN, POSTMASTER, NEW YORK, NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

BASS & ULLMAN
Attorneys for Plaintiff-Appellant
747 Third Avenue
New York, New York 10017
(212) 751-9494

(7289) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

TABLE OF CONTENTS TO BRIEF

Cases Cited

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1465

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AMERICAN IMAGE CORPORATION, 276 Park Avenue South, New York, New York,

Plaintiff-Appellant,

-against-

UNITED STATES POSTAL SERVICE and JOHN R. STRACHAN, Postmaster, New York, New York,

Defendant-Appellee

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PLAINTIFF-APPELLANT'S BRIEF

Statement of the Case

This is an appeal from a decision and order of the United States District Court (JA 39a) */ granting summary judgment herein to defendant-appellee and dismissing the complaint. The decision is reported at 370 F.Supp. 964 (SDNY 1974).

The complaint herein (JA 2a) seeks injunctive relief against enforcement of a postal mail stop order, issued under

*/ "JA" references are to pages of the Joint Appendix filed herein.

the purported authority of 39 U.S.C. §3005 and directing the postmaster to return all mail addressed to plaintiff-appellant with the words "Return to Sender: Order Issued Against Addressee for Violation of False Representation Law," on the ground that said mail stop order is illegal and void.

Appellee first instituted proceedings against appellant with the filing of a Postal Service Complaint dated April 26, 1972, alleging that appellant was seeking to obtain remittances of monies through the United States mails by false representations in violation of 39 U.S.C §3005. The administrative complaint alleged that certain advertising material for appellant's cosmetic product "Baby Face Formula" contained allegedly false representations as follows:

> "(3) By means of the advertisement referred to above, Respondent impliedly and expressly represents to the public in substance and effect:
>
> a. The female user of "'Baby Face' Formula" will thereby experience a rejuvenation of her physical appearance. (e.g., "I looked 20 years younger....In only 2 short months!!! Yes! This is my unbelievable story of how 'I' a 50 year old woman...transformed herself into a radiant woman who looked years younger! I actually rejuvenated my facial glands and skin tissues so that I now look years younger than I really am." etc.) (JA 10a-11a)
>
> b. Use of "'Baby Face' Formula" will prevent and eliminate wrinkles, lines and other

signs of skin aging. (e.g., "Yes, it was like a miracle took place--as years of telltale age lines seemed to disappear from my face in just 60 days." Sensational Beauty Preparation Helps End Lines, Wrinkles and Dry Flabby Skin Forever," "2. Age lines, Wrinkles, Flabby Dry skin MUST disappear." etc.) (JA 11a)

c. "'Baby Face' Formula" incorporates materially different and distinctive principles, techniques or ingredients from all other beauty preparations. (e.g., "My formula works in a completely new and different way from beauty preparations of the past. If you, like many other women, have spent small fortunes on different beauty preparations without the success you expected...now at last here is your opportunity to try my exciting new formula." etc.) (JA 11a).

Appellant's answer to the administrative complaint denied all of the allegations regarding alleged misrepresentation (JA 13a). Subsequently, in lieu of further time-consuming and costly proceedings and in lieu of the issuance of any order stopping appellant's mail, appellant entered into a Compromise Agreement pursuant to which appellant would be able to continue the sale of its product. Under the terms of the Compromise Agreement, and a Rider annexed thereto, it was agreed that appellant would discontinue the representations alleged in the administrative complaint, that each order received in response to appellant's original advertise-

ment would be accompanied by a statement that the product is not intended to eradicate wrinkles, and that the agreement was for settlement purposes only and did not constitute an admission of any violation of the Postal Statute (JA 15a-16a).

After executing the Compromise Agreement, appellant revised its advertisement, removing the references to rejuvenation and elimination of wrinkles. This new advertisement was not reviewed by the Postal Service to determine whether it would be in compliance with the Compromise Agreement because of the Postal Service's steadfast policy of refusing to review and comment upon advertising prior to publication. Although appellant's new advertisement referred merely to moisturizing dry skin and making skin smoother and younger looking (JA 37a), counsel for the Postal Service thereafter petitioned in the administrative proceeding for a "Remedial Order" to be issued by the Judicial Officer of the Agency, stopping appellant's mail on the grounds that the new advertisement constituted a breach of the aforementioned Compromise Agreement (JA 17a).

On July 19, 1973, the Judicial Officer of the Postal Service entered a decision and order stopping appellant's mail as requested by the petitioner (JA 30a). The decision of the Judicial Officer was based primarily on his finding that appellant

had repeated the representations of paragraph 3 c of the administrative complaint (JA 32a). The Judicial Officer also concluded that, although plaintiff had modified its advertisement with respect to the representations alleged in paragraphs 3 a and b, the "thrust" of these matters continued in its new advertisement (JA 32a). Thereupon, appellant instituted the within action for judicial review, and moved for summary judgment based on the administrative record, pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 704, 706(a).

Statement of Questions Presented

1. Whether the District Court erred in its criteria for review in determining whether appellant's new advertising violated the Compromise Agreement with the Postal Service.

2. Whether the Compromise Agreement with the Postal Service contemplated the representations in appellant's new advertising.

3. Whether appellant's new advertising violated the Compromise Agreement with the Postal Service.

4. Whether the Court should apply a strict standard of construction against the agency.

ARGUMENT

POINT I

THE REPRESENTATIONS IN APPELLANT'S NEW ADVERTISEMENT WERE CONTEMPLATED BY THE COMPROMISE AGREEMENT AND DO NOT CONSTITUTE A BREACH THEREOF

The Rider to the Compromise Agreement in the postal proceeding makes it abundantly clear that it was within the contemplation of the parties that the plaintiff would be able to continue the sale of its "Baby Face" cosmetic product. The Rider talks of discontinuing the alleged representations relating to rejuvenation and eradication of wrinkles, and provides for a statement to accompany future product sales in response to appellant's old advertisement. (JA 16a)

The Rider specifically provides that with respect to orders filled in response to the advertisement that was part of the Administrative Complaint, a statement would be included that the product was not intended to alter or reverse the natural aging process or to remove or eradicate lines or wrinkles due to aging. That was expressly the context in which the complainant in the Post Office proceeding objected to the representations of appellant's original advertisement. Significantly, appellant was not required to make any disclaimer, in filling orders in response to its original advertisement, as to that part of the advertisement which stated that the

product will lubricate and moisturize dry skin and will give a fresh youthful appearance. (JA 37a)

Appellant's new advertisement does not continue the representations which appellant agreed to discontinue by the terms of the Compromise Agreement. Appellant specifically eliminated the language which the administrative complaint alleged as the objectionable representations. The changes in appellant's new advertisement (JA 37a) included the following:

1. Appellant eliminated the headline reference to "20 years younger." Without admitting the allegations of the complaint, appellant removed the "20 year" reference to avoid any issue with respect to an alleged representation of rejuvenation. Appellant respectfully submits, however, that it is a far different thing to say that the use of a cosmetic skin cream will give the user younger looking skin. A representation of "look years younger" for an emolient cream - a moisturizing and lubricating agent - certainly does not carry with it a connotation of "rejuvenation" particularly in the perspective of all cosmetic skin cream advertisements wherein such claims are universally made.

2. Appellant specifically eliminated the reference to "rejuvenated my facial glands and skin."

3. Appellant eliminated the reference to plastic

surgery and the statement that lines "seemed to disappear from my face." Appellant submits that its references to smoother skin and that "lines seemed to fade from view" are not equivalent representations at all. Indeed, in another Postal Service Decision the Judicial Officer rejected an argument that the words "fade" and "disappear" were equivalent and, citing Webster's New World Dictionary of the American Language - College Edition, 1951, noted that the primary meaning of "fade" is "to become less distinct; lose color or brilliance; dim." (Naturalon Ltd., Postal Service Docket No. 1/172).

4. Appellant eliminated the statement that its preparation "helps end lines, wrinkles and dry flabby skin forever."

5. Appellant eliminated the statement in its guarantee that "age lines, wrinkles, flabby dry skin MUST disappear."

Thus, appellant eliminated all of the alleged representations which relate to rejuvenation, i.e., that its product will reverse the natural aging process, and the removal or eradication of lines and wrinkles due to aging. Clearly, the emphasis of plaintiff's revised advertisement is on the lubricating and moisturizing effects of its product and the resultant effect of giving the user smoother looking and younger looking

skin.

Appellant thus submits that it has not repeated the alleged representations of paragraphs 3 a and 3 b of the Administrative Complaint relating to rejuvenation and the elimination of wrinkles. Regarding paragraph 3 c of the Administrative Complaint, it was the understanding of the parties, in executing the Compromise Agreement, that the allegations of paragraph 3 c were to be construed in terms of the allegations in paragraphs 3 a and b that appellant was representing its product as a rejuvenator and for the eradication of wrinkles. This was specifically set forth in the letter to the counsel for the Postal Service submitting the Compromise Agreement which was accepted by the agency (JA 38a). Moreover, it is to be noted that the Rider to the Compromise Agreement did not require any disclaimer with respect to whether appellant's formulation was unique or different. There most certainly was no agreement or intention to prohibit appellant from representing that its product, as an emolient for smoother and younger looking skin, was different, unique or better than some other product.

In entering into the Compromise Agreement, appellant was not willing to agree, and did not agree, that it would not make the ordinarily accepted and proper cosmetic claims for its

product as a skin moisturizer and to promote smoother, younger looking skin. As stated in the affidavit of appellant's president, appellant would never have entered into the Compromise Agreement if it knew that it was appellee's intention to stop its mail for making such claims (JA 8a). If paragraphs 3 a and 3 b of the Administrative Complaint had alleged that appellant falsely represented that its product will give a younger looking and smoother looking complexion and cause wrinkles to fade, and that its formulation for such purpose is unique and different, appellant would have proceeded with a full evidentiary hearing and not signed the Compromise Agreement.

Clearly, however, the Rider to the Compromise Agreement had within its contemplation that appellant would not have to terminate the sale of its product. It was clearly within the contemplation of the parties that appellant would continue to sell its product. Those claims which appellant would not make were clearly spelled out, i.e., those referring to rejuvenation and removal of wrinkles.

Clearly, there was no intention that appellant be prohibited from making generally recognized cosmetic claims that its product would moisturize dry skin and provide a smoother, younger looking complexion. Those are the repre-

sentations found in appellant's new advertisement. Appellant respectfully submits that those representations are within the contemplation of the Compromise Agreement and are not a breach thereof.

POINT II

THE DISTRICT COURT ERRED IN ITS CRITERIA FOR REVIEW IN DETERMINING WHETHER APPELLANT'S NEW ADVERTISING VIOLATED THE COMPROMISE AGREEMENT WITH THE POSTAL SERVICE

Appellant respectfully submits that the District Court erred in characterizing the modifications in its new advertisement as "finespun distinctions." (JA 43a). It is an erroneous test to compare the two advertisements herein and say that because they are similar in appearance and use many of the same words, that the new advertisement is a continuation of the old. This is not a case wherein any contention is made that appellant's new advertisement is directed to and intended to be read by the same persons who read the old advertisement and, as to such persons, one ad seems like a continuation of another. Appellant's new advertisement is directed to new readers who are invited to respond to that advertisement alone and not to any prior advertisement. Simply stated - appellant's new advertisement should be read on its own merits and not in

a comparison with its old advertisement.

The representations in the advertisement which were the basis of the Administrative Complaint and those contained in appellant's new advertisement fall into two entirely different categories. The advertisement annexed to the Administrative Complaint dealt with matters of rejuvenation, reversing the aging process, and causing lines and wrinkles due to aging to be eradicated or disappear. Appellant's new advertisement talks of moisturizing dry skin and making skin look younger and smoother, giving a younger looking appearance.

The key issue herein is thus very narrowly drawn. The basic wrong charged in the original administrative complaint refers to alleged claims of rejuvenation and wrinkle removal. This must be distinguished from basic claims involving smoother and younger looking complexion. Obviously, any cosmetic advertising must appear similar in terms of the questions raised, and it is these "finespun distinctions" which is the very issue herein.

Readers of appellant's new advertisement are told of a product that will make skin softer and smoother looking, not of a product that will act as a rejuvenator and eliminate wrinkles. This is not a case of "finespun distinctions" discernable only to "a lawyer's eye" (JA 43a). Rather, this

is a case where a variation in but a few words makes the essential difference in the nature of the representations being made to the average reader. In effect, the Postal Service has here launched an attack against the entire cosmetic industry by alleging that representations pertaining to looking years younger, and younger looking and smoother looking skin are false. Representations of improved appearance by the use of cosmetic products have been properly made since time immemorial. In making statements relating to younger looking appearance and smoother looking skin, plaintiff says no more for its cosmetic skin cream than is said by all other manufacturers for their cosmetic products. In effect, the Postal Service order herein prohibits plaintiff from saying for its emollient skin cream what all of plaintiff's competitors are permitted to say for their skin moisturizers and emollients. Appellant respectfully submits that an alleged breach of a Compromise Agreement is not the appropriate vehicle for this agency to seek a change in the traditional claims for cosmetic creams of younger appearance and younger looking, smoother looking skin.

As noted in Point I, supra, this basic distinction between the kind of ordinary cosmetic claims made in appellant's new advertisement and the claims which were the subject of the administrative complaint is clearly recognized in the Rider

to the Compromise Agreement. The Agreement provided for a statement to accompany all orders filled in response to appellant's old advertisement that the product was not intended to reverse the natural aging process or eliminate lines or wrinkles due to aging. The Agreement did not require appellant to disclaim that part of its original advertisement which stated that its product will lubricate and moisturize dry skin and give a fresh youthful appearance. This is the very "fine-spun distinction" by which it was recognized that appellant would not be prohibited from selling its product with commonly recognized cosmetic representations of improved appearance.

POINT III

THE COURT SHOULD APPLY A STRICT STANDARD OF CONSTRUCTION AGAINST THE AGENCY WHERE THE APPLICABLE STATUTE AND REGULATIONS DO NOT PROVIDE FOR A COMPLIANCE PROCEDURE AND THE AGENCY HAS THE POWER TO IMPOSE A VERY DRASTIC REMEDY

Appellant respectfully submits that this Court should apply a strict standard of construction in determining whether appellant's new advertising is in violation of the Compromise Agreement.

The instant case and procedures utilized by the Postal Service may be contrasted with Federal Trade Commission

proceedings and procedures. The actions of the Postal Service are in marked contrast to those of the Federal Trade Commission which likewise has jurisdiction over advertising and enters into consent agreements in cases of alleged false advertising claims. With the FTC, when various advertising claims are to be discontinued, whether by agreement or by an order after a full administrative hearing, a respondent has the opportunity to present new advertising material for review, to determine the Commission's attitude on whether such new advertising will be deemed to be in compliance.

The Postal Service unwaveringly refuses to employ any such procedure. So rigid is this position that it refused to review a further modification of appellant's advertisement during the course of the Court's attempt to dispose of this appeal by settlement. By reason of such attitude, the only way to determine whether the Postal Service will consider revised advertising to be in compliance is to risk the expense of actual publication and hope that the Postal Service will not bring a proceeding to stop mail in response thereto.

Appellant respectfully submits that the refusal of the Postal Service to employ a compliance procedure enhances the potential for arbitrary action in inflicting the awesome and drastic remedy of stopping mail in subsequent determinations of non-compliance. Under such circumstances, i.e.,

the lack of a compliance procedure and the imposition of a severe and drastic remedy, appellant respectfully submits that the Court should adopt a strict standard of construction against the Postal Service in determining whether there has been a breach of a Compromise Agreement.

As observed by Mr. Justice Black in Reilly v. Pinkus, 338 U.S. 269, the Postal Service remedy of barring a party from using the mails "could wholly destroy a business" and is much more severe than the cease and desist order which is the remedy employed by the FTC. 368 U.S. at 277. Yet, the Post Office, unlike the Federal Trade Commission, refuses to employ any procedure which would afford a party subject to its proceedings, the opportunity to avoid the risk of what the Court has described as a "drastic remedy", Lynch v. Blount, 330 F.Supp. 689, 693 (SDNY 1971) aff'd 404 U.S. 1007 (1972).

In Stanard v. Oelsen, 74 S.Ct. 768, 770, 98 L.Ed. 1151, 1152 (1954), Mr. Justice Douglas observed that "the power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business, is a power that touches basic freedoms."

Where appellees seek to use this power to employ so drastic a remedy as stopping the mail without the availability of any prior compliance procedure, they should be held to the strictest standard of construction in the determination of any

breach of a Compromise Agreement. Such a strict standard of construction is particularly valid and appropriate in the case of a Compromise Agreement such as that entered into by the appellant in the instant case where the Agreement contemplated the continued sale of the product and specified the particular claims which the Postal Service had deemed objectionable, i.e., rejuvenation and the elimination of wrinkles.

CONCLUSION

For all of the foregoing reasons, appellant respectfully submits that the order of the District Court should be reversed, that appellees should be enjoined from enforcing the mail stop order of the Judicial Officer and that said mail stop order should be declared invalid and set aside.

Respectfully submitted

BASS & ULLMAN
Attorneys for Plaintiff-
Appellant

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

COURT OF APPEALS:SECOND CIRCUIT

XAMERICAN IMAGE CORP.,
Plaintiff-Appellant,

against

U.S. POSTAL SERVICE, et al,
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James Steele, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the **14th** *day of* **June** *19* 74 *at* **Foley Square, New York**

deponent served the annexed Appellant's Brief *upon*

Paul J. Curran-U.S. Attorney - Southern District-Attorney for Appellees

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

James Steele

Print name beneath signature

Sworn to before me, this **14th** *day of* **June** *19* 74

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975